in the

# Supreme Court of the United States

**OCTOBER TERM, 1977**

**NO. 77-1369**

MARY SANTO,

*Petitioner,*

*-vs-*

FEICK SECURITY SYSTEMS,
ZURICH INSURANCE COMPANY
AND THE
FLORIDA INDUSTRIAL
RELATIONS COMMISSION

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA INDUSTRIAL RELATIONS COMMISSION

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## OTHER AUTHORITIES (Continued)

in the

# Supreme Court
of the
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**OCTOBER TERM, 1977**

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**NO.**

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**MARY SANTO,**

*Petitioner,*

*-vs-*

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**RELATIONS COMMISSION**

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA INDUSTRIAL RELATIONS COMMISSION

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## A.

## OPINIONS BELOW

This petition directly involves a grave question of federal/state relations and is concerned specifically with the expanse of the *Longshoreman & Harbor Worker's Compensation Act,* 33 U.S.C. 901, *et. seq.* The Petitioner, Mary Santo[1] seeks a writ of certiorari to review the final order of the Florida Industrial Relations Commission in ALBERTO SANTO, Appellant v. FEICK SECURITY SYSTEMS and ZURICH INSURANCE COMPANY, Appellees, Claim No. 05-03-066, Order dated February 15, 1977.

ALBERTO SANTO died on April 24, 1975 while this cause was pending before the Judge of Industrial Claims. Thus the real party in interest in this case is Petitioner, MARY SANTO, who is eligible for benefits under either Florida Statute 440.16 or 33 U.S.C. 909.

The Judge of Industrial Claims as the trial court, entered a final compensation order in favor of the Respondent, ZURICH INSURANCE COMPANY, against the Petitioner which held that Petitioner's claim was cognizable under the Longshoreman & Harbor Worker's Compensation Act and was therefore within the statutory exclusion of Fla. Stat. 440.09(2) and without The Florida Workmens Compensation Act. The Industrial Relations Commission affirmed the decision of the Judge of Industrial Claims.

The Petitioner then filed a petition for a writ of certiorari in the Florida Supreme Court, seeking review of the final order of the Florida Industrial Relations Commission. The Florida Supreme Court denied the petition for a writ of certiorari in a 4-1 decision finding no deviation in the essential requirements of law. (In Case No. 51-264 in Florida Supreme Court, majority opinion and decision dated October 12, 1977; Petition for Rehearing denied December 28, 1977, 4 to 3).

Thus, the decision, judgment and opinion to which this petition is addressed, is the decision of the Florida Industrial Relations Commission.

Copies of the following decisions, opinions and the final orders are appended hereto:

Appendix A. Order of Supreme Court of Florida, dated December 28, 1977, denying petition for rehearing. (A 3-4).

Appendix B. Opinion of Supreme Court of Florida, dated October 12, 1977, denying petition for writ of certiorari. (A 5-6).

[1]See Appendix K for the original compensation claim filed in this cause. Appendix L is the letter by which the claim for compensation was amended to reflect the death of the claimant Alberto Santo and the substitution of Mary Santo as the party in interest. Florida Law holds that a letter is sufficient to amend the claim. *Turner v. Keller Kitchen Cabinets Southern, Inc.*, 247 So.2d 35 (Fla 1971). *Respondent initially paid benefits under the Florida Act to the Petitioner. Only after the death claim was filed did Respondent contravert and deny the Florida claim.* See Appendix M.

Appendix C. Order of Florida Industrial Relations Commission, affirming decision of the Judge of Industrial Claims, dated February 15, 1977. (A 7-9).

Appendix D. Final Compensation Order; findings of fact and conclusions of law of the Judge of Industrial Claims, of the Department of Commerce, State of Florida, District K. (A 10-15).[2]

[2]The following symbols will be used in this Brief:
A: Appendix to this Petition.
R: Reference to pages in record on appeal which includes transcript.
Respondent refers to the Respondent ZURICH INSURANCE COMPANY unless otherwise indicated.



B.

## GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The final order of the Florida Industrial Relations Commission bears date April 19, 1976 (Appendix C, A 7-9). A petition for a writ of certiorari was filed in the Florida Supreme Court, however, the Florida Supreme Court denied the writ by its order of October 12, 1977 (Appendix B, A 5-6). The Supreme Court of Florida denied a petition for rehearing addressed to its four-one denial of the petition for writ, by order dated December 28, 1977 (Appendix A, A 3-4). Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1257(3); 28 U.S.C. 2101(c); and Supreme Court of the United States, Revised Rules, effective July 1, 1970, Rule 19(1)(a); Rule 21; Rule 22(3) and Rule 23. The petitioner contends that the Florida Industrial Relations Commission granted a decision "where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held on authority exercised under the United States." [28 U.S.C. 1257(3)].[3]

[3]The State Supreme Court of Florida declined to exercise jurisdiction. Thus, review appropriately is sought of the judgment and decision of the Florida Industrial Relations Commission, the highest Court of the State in which a decision "could be had." Thus a review of the decision of the Florida Industrial Relations Commission is appropriately sought (28 U.S.C. 1257); *Randall v. Board of Commissioners,* 261 U.S. 252, 1923. *American Express Co. vs Levee,* 263 U.S. 19 (1923).

Substantial conflict between federal and state relations based upon a misinterpretation of 33 U.S.C. 904, the jurisdictional provision of the Longshoreman & Harbor Worker's Compensation Act is claimed.

Review is timely sought after exhaustion of efforts to obtain full review in the Florida Courts and administrative system.



C.

## QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE FLORIDA INDUSTRIAL RELATIONS COMMISSION INCORRECTLY CONSTRUED THE LONGSHOREMAN & HARBOR WORKER'S COMPENSATION ACT, TO COVER THE PETITIONER'S ACCIDENT AND HAS THEREBY CREATED A SUBSTANTIAL CONFLICT IN FEDERAL-STATE RELATIONS.

D.

## STATUTES AND REGULATIONS INVOLVED

The Florida Workmen's Compensation Act and the Longshoreman & Harbor Worker's Compensation Act directly are involved:

1. F.S. 440.02(1) (1974) which provides:

   a. Employment.

      (1) Employment, subject to the other provisions of this chapter, means any service performed by an employee for the person performing it.

   b. The term employment shall include:

      (1) Employment by the state and all political subdivisions thereof, and all public and quasi-public corporations therein, including officers elected at the polls.

      (2) All prior employments in which one or more employees are employed by the same employer.

   c. The term employment shall not include service by or as:

      (1) Domestic servants in private homes.



      (2) Agricultural labor performed by the farmer and employed by a bona fide farmer, or association of farmers who employs 5 or less regular employees and who employs less than 12 other employees at one time for seasonal agricultural labor that is completed in less than 30 days, provided such seasonal employment does not exceed 45 days in the same calendar year. The term "farm" includes stock, dairy, poultry, fruit, fur bearing animals, fish and truck farms, ranches, nurseries and orchards. The term "agricultural labor" includes field foremen, timekeepers, checkers and other farm labor supervisory personnel.

      (3) Professional athletes, such as professional boxers, wrestlers, baseball, football, basketball, hockey, polo, tennis, jai alai, and similar players.

2. F.S. 440.02(2) (1954) which provides:

   a. Employee.

      (1) "Employee" means every person engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed.

3. F.S. 440.03 (1970) which provides:

> "Every employer and employee as defined in Section 440.02 shall be bound by the provisions of this chapter."

4. F.S. 440.09(2) (1975) which provides:

> "No compensation shall be payable in respect of the disability or death of any employee covered by the Federal Employees Act, the Longshoreman's & Harbor Worker's Compensation Act or the Jones Act."

5. 33 U.S.C. 902(2-4) (1938) which provides:

   a. "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or which naturally or unavoidably results from such accidental injury and incurs an injury caused by the willful act of a third person directed against an employee because of his employment."

   b. "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, ship breaker, but such time does not include a master or member of a crew of any vessel or any person engaged by



the master to load or unload or repair any small vessel under 18 tons net."

   c. "The term 'employer' means an employer, any of his employees employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railroad, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."

6. 33 U.S.C. 903(a) (1927), which provides:

> "Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, drydock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel. No compensation shall be payable in respect of the disability or death of:
>
> (1) Master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or any state or fine government or of any political subdivision thereof.

## E.

## STATEMENT OF THE CASE

1. *Proceedings below.*

a. The Petitioner, as claimant in the Workmen's Compensation Court, District K, Florida Department of Commerce, filed a claim for workmen's compensation benefits allowable under the law of Florida. The basis of the action was that petitioner suffered a compensable industrial accident within the meaning of a Florida Workmen's Compensation Act.

Petitioner while guarding vessel, suffered an industrial accident on board said vessel while the vessel was docked in Biscayne Bay. Petitioner was employed at the time of the injury by a security guard agency and his duties involved patrolling both on and off the boat (R 40, 52, 72).

b. Respondent, ZURICH INSURANCE COMPANY, contended that the Judge of Industrial Claims was without jurisdiction to adjudicate the petitioner's claim in that the accident occurred upon navigable waters. After evidentiary hearings on the jurisdictional issue, the Judge of Industrial Claims determined that he had no jurisdiction because the claim was properly cognizable under the Longshoreman & Harbor Worker's Act and petitioner was thereby excluded from the recovery of benefits under the Florida Workmen's Compensation Act (A 10-15) (R 123-127).



c. The claimant appealed to the Florida Industrial Relations Commission. The Commission affirmed the judgment in all respects (A 7-9).[4]

d. The petitioner sought review in the Florida Supreme Court by means of a petition for writ of certiorari. The Court denied the writ, finding that there was no deviation from the essential requirements of law below. (*Scholastic Systems, Inc. v. Leloup,* 307 So.2d 166 [Fla 1974]; *Chicken 'N' Things v. Murray,* 329 So.2d 302 [Fla 1976]). Petition for Rehearing was made and denied (A 3-4). This petition follows:

2. *The propriety of the Florida Workmen's Compensation claim raised at relevant times below from the outset. (U.S. Supreme Court Rule 23f.)*

The Petitioner, at all times, claimed that the injury resulting from the industrial accident was not covered by the Longshoreman & Harbor Worker's Compensation Act and thereby it was compensable under the Florida Workmen's Compensation Act.

a. Respondent moved to dismiss the petition and claimed before the Judge of Industrial Claims that the Florida Department of Commerce lacked jurisdiction in this matter in that the incident occurred on board a ship docked

[4]There is no provision within the Florida Rules of Workmen's Compensation procedure for petition for rehearing before the Florida Industrial Relations Commission.

upon navigable waters. (A 2, 20-22). The Respondents claim this cause was within the aegis of the Longshoreman & Harbor Workers Compensation Act and not under Florida Workmen's Compensation (R 6, 10-12). The trial court held it lacked subject matter jurisdiction to proceed with the claim because jurisdiction was properly under the Longshoreman & Harbor Worker's Act. (33 U.S.C. 901, et. seq. [R 125-126, A 10-15]).

b. Petitioner appealed to the Florida Industrial Relations Commission challenging that ruling (A 27-28).[5]

Petitioner filed an Application for Review specifically challenging the threshold jurisdictional issue (A 27-28).

c. At page 5 of its brief before the Florida Industrial Relations Commission, the appellant (petitioner here) contended the Judge of Industrial Claims erred because the claim in the instant case was not cognizable under

[5]Fla. Rule Workmen's Compensation Procedure 14 entitled *Application and Cross Applications for Review; Proof of Service.* Application for Review on order of the judge of the Commission will be filed with the Commission or judge within 20 days after the date copies of the Judge's order are mailed to the parties at the last known address of each. Any appellee who desires review of any adverse ruling by the judge shall file his cross Application for Review with the Commission or a judge within 10 days after the filing of the Application for Review. Applications and cross applications for review shall state concisely and particularly the grounds upon which the parties rely. Failure to comply with this section may be grounds for dismissal.



Longshoreman & Harbor Worker's Compensation as the Judge had held but was compensable within the Florida Workman's Compensation Act (A 25-26).

d. The Florida Industrial Relations Commission held that the appellant (petitioner here) failed to demonstrate reversable error and affirmed the order of the trial court (A 7-9). Thus the Florida Industrial Relations Commission held flatly that the petitioner's claim was within the confines of the Longshoreman & Harbor Worker's Compensation Act and without the jurisdiction of the Florida Workmen's Compensation Statute.

e. Florida Supreme Court jurisdiction depended on a departure from the essential requirements of law, a traditional test for the granting of common law certiorari in Florida (A 23-24). Thus the jurisdictional issue of Longshoreman & Harbor Worker's Compensation Act, vis a vis the Florida Workmen's Compensation Act was raised to the extent possible by law. Federal and Florida cases, and the Federal and Florida Compensation Acts were cited to prove that no jurisdictional existed under the Longshoreman & Harbor Worker's Compensation Act to adjudicate this claim and this case was properly before the judge of Industrial Claims as a compensable claim under the Florida Workmen's Compensation Act. Jurisdiction of the Florida Supreme Court was incumbent upon a showing that the Florida Industrial Relations Commission departed from

the essential requirements of law in reaching its decision.

f. In his brief to the Florida Supreme Court, written in support of the Petition for Writ of Certiorari, the very same contention was made; the Florida Industrial Relations Commission had departed from the essential requirements of law in entering its decision in that the claim was properly compensable under Florida Compensation and not under the Longshoreman & Harbor Worker's Act (A 17-22).

g. The Florida Supreme Court denied the Petition for Writ of Certiorari finding the Industrial Relations Commission had not departed from the essential requirements of law. (A 5-6).

Petitioner then filed a Petition for Rehearing and again flatly contended that the claim in the case sub judice was within the jurisdiction of the Florida Compensation Act (A 16). The petition discussed the recent opinion of this Court in *Northeast Marine Terminal v. Caputo,* _____U.S._____, 97 Supreme Court 2348 (1977). This case was decided subsequent to the submission of briefs by both sides with regard to the Petition for Writ of Certiorari. The decision construed the 1972 amendments to the Longshore & Harbor Worker's Compensation Act, said amendments being in full force and effect *at the time of the accident.* Petitioner conceded that the situs of the accident was on navigable waters but contended as he had in the various briefs filed below, that petitioner did not satisfy the status test enunciated within the 1972 amendments to the Longshoreman & Harbor Worker's Compensation Act. Therefore, Petitioner argued he was not eligible for benefits under the Federal Act and was restricted to benefits under the Florida Workmen's Compensation Act. The Petition for Rehearing was denied by the Florida Supreme Court by a 4 to 3 decision (A 3-4).



Thus, the Petitioner, MARY SANTO, initially attempted to demonstrate at each and every proceeding that the claim was not properly within the Longshoreman & Harbor Worker's Compensation Act and indeed was compensable under the Florida Workmen's Compensation Act. However, the trial court held that the claim was compensable under the Federal Act and thereby excluded under the State Act; and the Florida Industrial Relations Commission affirmed the trial court. Petitioner has raised the jurisdictional question at all relevant points. Thus the point is clearly raised here.

3. *Issues at trial and trial record.*

The litigation arose out of an industrial accident which occurred when petitioner was on a boat docked in Biscayne Bay. At the time of the accident, petitioner was employed by the respondent, FEICK SECURITY SYSTEMS as a security guard. The University of Miami, owners of the R.P. Gillis, an oceanographic

vessel, had contracted with FEICK SECURITY SYSTEMS for security guard services to guard the research vessel. The accident report admitted into evidence below shows that Mr. Santo fell while on board the ship. The parties stipulated that the accident occurred on board the vessel. The vessel was docked at the time of the accident. At the time of the accident, Santo was within the course and scope of his employment guarding the University research vessel and keeping unauthorized personnel off the ship (R 25, 26). The security guards did not participate in navigational operation of the vessels and were not permitted to touch any of the equipment on the boat (R 76).

The trial court, contrary to the position of petitioner, held that it was without jurisdiction to hear the claim because the claim was properly cognizable under the Longshoreman & Harbor Worker's Compensation Act and pursuant to F.S. 440.09(2) the Judge of Industrial Claims lacked jurisdiction in the matter. The trial court found that the accident occurred on navigable waters and rejected petitioner's position that the accident was compensable under Florida Workmen's Compensation and dismissed the claim.

4. *Opinion of the Industrial Relations Commission.*

The Florida Industrial Relations Commission affirmed the Judge of Industrial Claims holding that the appellant (petitioner here) had failed to demonstrate that the Judge of Industrial Claims committed reversible error (A 7-9).



5. *Supreme Court decision.*

The Florida Supreme Court simply denied the writ of certiorari finding no deviation from the essential requirements of law. The original denial was by a vote of 4 to 1 (A 5-6). Petition for Rehearing was denied by a vote of 4 to 3 (A 3-4). Thus the Florida Supreme Court refused to exercise jurisdiction. Thus the writ is properly addressed to the decision of the Florida Industrial Relations Commission.

F.

## REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA INDUSTRIAL RELATIONS COMMISSION THAT THE ACCIDENT IN QUESTION WAS COMPENSABLE UNDER FLORIDA WORKMEN'S COMPENSATION, PROVOKES A SUBSTANTIAL CONFLICT BETWEEN STATE AND FEDERAL RELATIONSHIPS AND IS IN CONFLICT BOTH WITH DECISIONS OF THE COURT AND THE LOWER FEDERAL COURTS CONSTRUING PROVISIONS OF THE LONGSHOREMAN & HARBOR WORKER'S COMPENSATION ACT.

1.

We believe that the decision of the Florida Industrial Relations Commission in deciding that this case was compensable under Longshoreman & Harbor Worker's Compensation and thereby excluded from Florida Workman's Compensation is in substantial conflict with the precedents established by this Court. Petitioner, a security guard employed by a security guard agency, guarding an ocean-going vessel while docked, and injured while on the vessel, clearly does not come within any of the specific statutory categories of coverage set out in 33 U.S.C. 902(3) and 33 U.S.C. 902(4). Contrary to the trial court's determination, the situs of the injury is not the sole consideration in deciding under what act the claim is compensable.



Just last term in *Northeast Marine Terminal v. Caputo*, ____U.S.____ 97 S.Ct. 23 18 (1977), this court construed the 1972 amendments to the Longshoreman & Harbor Worker's Compensation Act, which were in effect at the time of the accident. In *Northeast Marine Terminal* this court held that the act focuses primarily on longshoremen, harbor workers, ship repairmen, shipbuilders and ship breakers. Prior to this decision, the Circuit Courts of Appeal had advanced various theories to define "status" as construed within the words "maritime employment."[6]

The conflict in decisions of the Circuit Courts indicated that the act as amended was not a model of clarity. This Court's decision in *Northeast Marine Ter-*

[6]Some of the theories were:

a. Point of Rest Doctrine: *See: ITO Corp. of Baltimore v. Benefits Review Board*, 529 F2d 1094 (4th Cir. 1975), *mod.* 542 F2d 903 (1976) (en banc).

b. The functional relationship of the employee's activity to maritime transportation. *See: Sealand Service, Inc. v. Dir. of Office of Work. Comp. Programs*, 540 F2d 629 (3rd Cir. 1976).

c. The direct involvement of an employee in loading, unloading, repairing, building or breaking a vessel. *See: Jacksonville Shipyards, Inv. v. Perdue*, 539 F2 533 (5th Cir. 1976).

d. Cargo handlers engaged in the handling of cargo up to the point where the consignor has actually begun movement from the pier. *See: Pittston Stevedoring Corp. v. Dellaventura*, 544 F2d 35, 41 (2d Cir. 1976), *aff'd sub nom, Northeast Terminal v. Caputo*, ____U.S. ____, 97 S.Ct. 2348 (1977).

*minal* apparently ends the conflict by defining maritime employment as those workers involved in the essential elements or integral parts of unloading a vessel. This Court stated:

> "The example (in the Committee report) makes it clear that persons who are on the situs but not engaged in the overall process of loading and unloading are not covered."[7]

Thus the Court has made involvement in maritime related employment the key in the determination of status under the Act. In this respect it is significant to note that the trial court made no finding as to the maritime status of the petitioner other than the situs of the injury.

**2.**

Post *Northeast Marine Terminal* decisions of the Circuit Court confirm the maritime employment nexus requirements.[8] Therefore, we feel that the decision below which held that petitioner as a security guard injured on a vessel docked in navigable waters, eligible for

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[7]Id. at ___U.S. ___, 97 S.Ct. 2348, 2359.

[8]For the Longshoreman & Harbor Worker's Compensation Act to apply, the job must be a necessary ingredient or integral part of the job of the longshoreman, harbor worker, boat builder or boat breaker. *Dravo Corp. v. Banks*, Case No. 77-1433 (3rd Cir. 1977).

An employee injured on the situs but not engaged in maritime employment at the time of the injury is not eligible for longshoreman's benefits. *Cargill, Inc. v. Powell*, Case No. 75-2655 (9th Cir. 1977).



Longshoreman & Harbor Worker's benefits, is in direct conflict with the *Northeast Marine Terminal* decision and its progeny.[9]

Clearly, petitioner as a security guard does not fit within any of the categories of longshoremen or harbor workers. Since petitioner is not within the specific compensable categories, petitioner maintains that decedent was not within the Longshoreman & Harbor Worker's Compensation Act and is therefore within the Florida Worker's Compensation Act.

**3.**

The decision below has implications in the field of federal-state relations, greater than the jurisdiction of the Florida Workmen's Compensation Statute. The effect of the decision below is to establish a hiatus or no-man's land between state and federal compensation acts whereby one cannot be sure as to whether the accident is covered by state compensation or by Longshoreman & Harbor Worker's Compensation. This creates a basic jurisdictional problem and conflict between state and federal acts.

Petitioner finds herself caught in the unenviable position of being denied state compensation because of the apparent availability of Longshoreman & Harbor Worker's Compensation. At the same time, petitioner is

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[9]In *Benjamin S. Stewart v. Brown & Root, Inc.*, 7BRBS 356, 365 (1978) the Benefits Review Board defined harbor worker as one directly involved in the construction, repair, alteration of maintenance of harbor facilities. Under this interpretation, petitioner could not be considered a harbor worker.

faced with a real and definite probability of denial of Longshoreman & Harbor Worker's Compensation benefits because of the non-maritime character of his employment.[10] The 1st Circuit Court of Appeals has apparently held that a security guard is not within the parameters of the Longshoreman & Harbor Worker's Compensation Act.[11]

The jurisdiction of the Florida Workman's Compensation Act was litigated below and is res judicata and may not be argued in subsequent proceedings. *Baldwin v. Iowa State Traveling Men's Association,* 282 U.S. 522 (1930).[12] However the determination of a state compensation judge, that this cause lies under the Federal Act may not be binding upon the Federal Compensation Judge.[13] Thus petitioner may have a compensable accident and no legal recourse.

There exists a real potential danger that others may fall into the jurisdictional quagmire which engulfs the petitioner. This Court in *Northeast Marine Terminal* did settle the qualifications necessary to come within

[10]*Northeast Marine Terminal* clearly holds that only maritime related employment is compensable under the Longshoreman & Harbor Worker's Compensation Act. *See also: Dravo Corp. v. Bench,* Case No. 77-1433 (3rd Cir. 1977). *Cargill, Inc. v. Powell,* Case No. 75-2655 (9th Cir. 1977).

[11]*Stockman v. John T. Clarke & Sons of Boston,* 539 F2 264, 272 (1st Cir. 1976).

[12]*See: Durfee v. Duke,* 375 U.S. 106 (1963).

[13]Compare: *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939) with *Baldwin v. Iowa State Traveling Men's Assoc.* 282 U.S. 522 (1930).



the Longshoreman & Harbor Worker's Compensation Act. *Northeast Marine* did not settle the scope of the Longshoreman & Harbor Worker's Compensation Act. We now ask this Court for a determinative ruling on the breadth and width of the jurisdictional provisionals of the Longshoreman & Harbor Worker's Act, codified in 33 U.S.C. 904(a).

Previously in the checkered history of longshoreman's compensation, the defunct "maritime but local theory"[14] would have prevailed and state compensation would have been awarded. The present act apparently abolishes the maritime but local exception and changes the test to one of maritime employment. While the present Longshoreman & Harbor Worker's Compensation Act no longer contains "twilight zones"[15] or "maritime but local theories", petitioner believes that he is still within the boundaries of state compensation under the precedents decided by this Court because he is a non-maritime employee. Petitioner is therefore entitled to Florida Workmen's Compensation benefits and the statutory exclusion of Florida Statute 440.09(2) does not apply.

4.

The case below was decided upon the framework of the pre-1972 Longshoreman's and Harbor Worker's Compensation Act. The Court below ignored the dif-

[14]*Western Fuel Co. v. Garcia,* 257 U.S. 233 (1921); *Grant-Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469 (1922).

[15]*Davis v. Department of Labor & Industries of Washington,* 317 U.S. 249 (1942).

ference between the pre and post 1972 Longshoreman & Harbor Worker's Compensation Act. In relying upon *Calbeck v. Traveler's Insurance Co.*, 370 U.S. 114 (1962), the trial court erred because the precedential value of *Calbeck* was destroyed when the 1972 amendments took effect.[16] The accident in question took place after the effective date of the 1972 amendments. The Longshoreman & Harbor Worker's Compensation Act as amended should control here. This Court should grant the petition for Writ of Certiorari and set this case for argument.

[16]Indeed, Justice Brennan's famous dictum that the "maritime but local theory" meant that the Longshoreman & Harbor Worker's Compensation Act should cover all employment related injuries which occurred on navigable waters is no longer true after the effective date of the 1972 amendments.



## CONCLUSION

The Petition for Writ of Certiorari should be granted and the decision and judgment of the Florida Industrial Commission should be quashed and reversed with directions to the trial court to hold hearings on the merits of the case *sub judice*. The Florida Industrial Relations Commission has passed upon an issue of federal-state and federal relations and has created substantial conflict between state and federal relations and the decision is in conflict with decisions of this Court and lower Federal Courts construing the provisions of the Longshoreman & Harbor Worker's Compensation Act. Accordingly, under Rule 19A of the Rules of this Court, certiorari review is indicated because the Florida Industrial Relations Commission has most assuredly decided the case in a way that is not in proper accord with the decisions of this Court. Review is warranted in this important area of federal-state relations.

Respectfully submitted,

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9445 Bird Road
Miami, Florida 33165
Attorneys for Petitioner

By: _____
GEORGE M. NACHWALTER

and

_____
JAY M. LEVY

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Petition for a Writ of Certiorari was mailed to FREDERICA SMITH, ESQ., of MARLOW, SHOFI, ORTMAYER, SMITH & SPANGLER, Attorneys for ZURICH, 1428 Brickell Avenue, Suite 204, Miami, Florida 33131, to MRS. VERNA MARTIN, Clerk, INDUSTRIAL RELATIONS COMMISSION, 1321 Executive Center Drive, East, Tallahassee, Florida 32301 and EDWARD MOSS, ESQ., of BRUMER, MOSS, COHEN & RODGERS, Attorneys for FEICK SECURITY, 28 West Flagler Street, Miami, Florida this 27th day of March, 1978.

NACHWALTER, CHRISTIE &
FALK, P.A.
9445 Bird Road
Miami, Florida 33165

By: _____
GEORGE M. NACHWALTER

and

_____
JAY M. LEVY



# Appendix

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## INDEX TO APPENDIX (Continued)





## APPENDIX A

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 28, 1977

CASE NO. 51,264

ALBERTO SANTO,
Petitioner,

vs.

FEICK SECURITY SYSTEMS, ET AL,
Respondents.

On consideration of the petition for rehearing filed by attorneys for petitioner, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur
SUNDBERG, HATCHETT and KARL, JJ., Dissent

C
cc: Mrs. Verna Martin, Clerk

Jay M. Levy, Esquire
Of Nachwalter, Christie & Falk
Fredricka G. Smith, Esquire
of Marlow, Shofi, Ortmayer, Smith & Spangler
Edward Moss, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By Debbie Causseaux
Deputy Clerk



**APPENDIX B**

Supreme Court of Florida

WEDNESDAY, OCTOBER 12, 1977

OCT 17 1977

CASE NO. 51,264
INDUSTRIAL RELATIONS COMMISSION

ALBERTO SANTO, etc.,
Petitioner,

vs.

FEICK SECURITY SYSTEMS, et al.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Industrial Relations Commission and the Court finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: *Scholastic Systems, Inc., et al. vs. LeLoup, et al.*, 307 So.2d 166 (Fla. 1974).

Petition for Attorney's Fees filed by the attorney for Petitioner is hereby denied.

ADKINS, Acting C.J., BOYD, ENGLAND and SUNDBERG, JJ., concur
HATCHETT, J., dissents

TC
cc: Hon. Verna Martin, Clerk

Steven P. Kronenberg,
Esquire
Fredricka G. Smith, Esquire
Edward Moss, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Tanya Carroll
Deputy Clerk



**APPENDIX C**

State of Florida

INDUSTRIAL RELATIONS COMMISSION

CL. NO. 055-03-0666
D/A. 12/25/74

Alberto Santo,
Appellant

v.

Feick Security Systems
Zurich Insurance Company,
Appellees

Nachwalter, Christie & Falk, Miami, for Appellant

Brumer, Moss, Cohen & Rodgers; Marlow, Mitzel, Ortmayer & Shofi, Miami, for Appellees

**ORDER**

Per Curiam.

The Judge of Industrial Claims entered an Order on March 17, 1976, wherein he dismissed the claim for benefits.

The Appellant filed an application for review by the Industrial Relations Commission of that Order, and presents the following point:

> Whether the Judge of Industrial Claims erred in dismissing the claimant's claim with prejudice, on the ground that jurisdiction of the claim came under the Federal Longshoremen's and Harbor Worker's Compensation Act.

This cause having been orally argued before the Commission, the briefs and record on appeal having been read and given full consideration, and Appellant having failed to demonstrate reversible error, the Order of the Judge of Industrial Claims dated March 17, 1976, is affirmed.

It is so ordered.

INDUSTRIAL RELATIONS
COMMISSION

ELMER O. FRIDAY, JR.,
Chairman

SEAL

LEANDER J. SHAW, JR.,
Commissioner

L. F. BLANKNER, JR.,
Associate Commissioner



THIS IS TO CERTIFY that on this February 15, 1977, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy mailed to each party at his last known address.

INDUSTRIAL RELATIONS
COMMISSION

BY /s/ V. Martin
Clerk
(Title)

cc: Mario Goderich
Judge of Industrial Claims

**APPENDIX D**

STATE OF FLORIDA
DEPARTMENT OF COMMERCE
—DIVISION OF LABOR—
—BUREAU OF WORKMEN'S
COMPENSATION—
JUDGE OF INDUSTRIAL CLAIMS

Bureau File No. 055-03-0666

Date of Accident 12/23/74

[FILED MAR 20 1976]

ALBERTO SANTO
8151 N.W. 27 Avenue
Miami, Florida

Employee

vs.

FEICK SECURITY SYSTEMS
9200 S. Dadeland Blvd.
Suite 216
Miami, Florida

Employer

ZURICH INSURANCE COMPANY
5600 Diplomat Circle
Orlando, Florida 32810

Carrier



**COMPENSATION ORDER**
**OF**
**Mario P. Goderich**
**JUDGE OF INDUSTRIAL CLAIMS**

FOR EMPLOYEE

Steven Kronenberg, Esq.
NACHWALTER, CHRISTIE & FALK
9211 Bird Road
Miami, Florida

FOR EMPLOYER

BRUMER, MOSS & COHEN
28 W. Flagler Street
Miami, Florida

FOR CARRIER

Fredricka G. Smith, Esq.
MARLOW, MITZEL, ORTMAYER & SHOFI
1428 Brickell Avenue
Miami, Florida 33131

AFTER DUE NOTICE to the parties, hearings on carrier's Motion to Dismiss the above-entitled claim were held on September 9, 1975 and February 2, 1976 before the undersigned Judge of Industrial Claims.

The claim as presented was for death benefits for Mary Santo, widow of deceased ALBERTO SANTO, arising out of an accident to deceased occurring on December 23, 1974 while in the course and scope of his employment as a guard aboard a research vessel on navigable waters.

The carrier controverted the claim on the ground that, inter alia, the Judge of Industrial Claims was without jurisdiction to consider this claim pursuant to Florida Statute 440.09(2). Further the carrier filed a Motion to Dismiss the claim for lack of jurisdiction. It was stipulated by the parties that hearings would be held on the Motion to Dismiss including an evidentiary hearing to take testimony regarding the jurisdictional facts of the claim. It was stipulated by the parties that an employer/employee relationship existed at the time of the alleged accident and that the thirty (30) day provision in Florida Statute 440.25(3)(b) is waived.

Since the carrier had denied coverage to the employer for accidents arising under the jurisdiction of the Federal Longshoremen and Harbor Worker's Act, the employer retained counsel to represent it in the instant proceedings.

The carrier, as the moving party, presented the testimony of Al Mauck, Director of Security at Feick Security Systems and Captain Nathan Bauch, the deceased worker's immediate supervisor. Each of these witnesses testified that deceased was employed as a watchman and was assigned to guard the University of Miami Research Vessel Gillis on the day of his accident. Mr. Mauck testified that Feick Security Systems provided a guard service for the vessel pursuant to a con-



tract between Feick and the University of Miami. Mauck and Bauch stated the watchmen were to patrol the vessel docked at Dodge Island in order to prevent unauthorized access to the vessel. They stated that the guards were to watch the ship from the dock, but that they were allowed to board the vessel to obtain coffee, use the toilet facilities and to carry out further investigation if an unauthorized person boarded the vessel. Neither of these witnesses had any personal knowledge of Santo's work activities the day of the accident or of the circumstances surrounding the accident. However it was stipulated by both the claimant and the employer that the accident occurred while claimant was aboard the vessel in the course and scope of his employment.

Carrier also presented the testimony of Captain Scott Berryman, Marine Superintendent at the University of Miami. He stated that according to the posted regulations on board the research vessel, the guards were to make rounds aboard the vessel at specified intervals of time and that he had, on numerous occasions, seen the Feick Security guards aboard the research vessels. In addition, he testified that the vessel was engaged in oceanographic research.

The employer/claimant called as its witness, Richard Adams, the general manager of Feick Security Systems who reiterated that the guards were to stay on the shore side. However, he stated that the guard was to remain in his car only in inclement or cold weather. Adams said that he was not at all familiar with any of the instructions or rules to which Captain Berryman referred and that the contract between the University of Miami and Feick Security Systems was not negotiated through Berryman's office.

Memoranda of law were submitted by the parties for consideration by the Judge of Industrial Claims.

Based on the testimony produced at the hearings and after considering the instructive memoranda submitted by counsel, I have weighed and resolved all evidentiary conflicts and find as follows:

1. Claimant's deceased on or about December 23, 1974 while employed as a security guard for Feick Security Systems, suffered an accident while on board a University of Miami research vessel on navigable waters of the United States while in the course and scope of his employment and as an incident thereto.

2. That jurisdiction of the within claim is properly under the Federal Longshoremen's and Harbor Worker's Act and that therefore, pursuant to Florida Statute 440.09(2), the Judge of Industrial Claims lacks jurisdiction in this matter. Atlas Iron and Metal Company v. Hesser, 177 So.2d 199 (1975); Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962); Rex Investigative and Patrol Agency v. Collura, 329 F. Supp. 696 (E.D. N.Y. 1971).

WHEREFORE, it is ordered that the Carrier's Motion to Dismiss for lack of jurisdiction is hereby granted and the claim is dismissed with prejudice.



DONE AND ORDERED in Chambers, this 17 day of March, 1976, at Coral Gables, Florida.

/s/ Mario Goderich
JUDGE OF INDUSTRIAL CLAIMS

SEAL/

parties

This certifies that the foregoing Order was entered on the 17 day of March, 1976 and a copy therefore was sent by mail to all interested parties at the last known address of each.

/s/ P. Ricketts
Secretary to Judge of Industrial Claims

2. That the Judge of Industrial Claims in this cause held that the petitioner's remedy was under the Federal Longshoremen's and Harbor Workers Act (33 USC 901 et. seq.) and, therefore, petitioner was excluded from obtaining Florida workmen's compensation benefits. Fla. Stat. 440.09(2). The Industrial Relations Commission affirmed the holding of the Judge of Industrial Claims.

3. On June 17, 1977, subsequent to the writing and filing of the Briefs in this cause, the United States Supreme Court decided the case of N.E. Marine Terminal Co., Inc., v. Caputo, ____ US ____, 97 S.Ct. 2348 (1977). The decision of this Court overlooks and omits the construction which the U.S. Supreme Court in N.E. Marine Terminal Co., Inc. case has given the Longshoremen's and Harbor Workers Compensation Act as amended in 1972.

4. The N.E. Marine Terminal case construes the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act, and specifically construes 33 U.S.C. 902(3). This section was amended in 1972 and defines the term employee as used in the Longshoremen's and Harbor Workers Compensation Act as:

> "Any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations and any harborworkers . . ."





## POINT INVOLVED ON CERTIORARI

WHETHER THE INDUSTRIAL RELATIONS COMMISSION FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW IN AFFIRMING THE ORDER OF THE JUDGE OF INDUSTRIAL CLAIMS, WHICH DISMISSED THE PETITIONER'S CLAIM FOR LACK OF JURISDICTION.

## ARGUMENT

THE INDUSTRIAL RELATIONS COMMISSION FAILED TO COMPLY WITH THE ESSENTIAL REQUIREMENTS OF LAW IN AFFIRMING THE ORDER OF THE JUDGE OF INDUSTRIAL CLAIMS, WHICH DISMISSED THE PETITIONER'S CLAIMS FOR LACK OF JURISDICTION.

-I-

THE PETITIONER'S EMPLOYMENT WAS NOT MARITIME IN NATURE.

It is respectfully submitted that the Judge of Industrial Claims erred in dismissing the instant claim, pursuant to the Federal Longshoremen's and Harbor Worker's Compensation Act. It is true that the parties did stipulate that Mr. Santo's injury occurred while on board the vessel which he guarded (T-85). However, the locus of the injury is not the test by which Federal Com-

pensation jurisdiction is determined. Instead, it is the purpose of the Claimant's employment which governs the applicability of the Federal Longshoremen's Act.

The Federal Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C., §902(3) states that, under the Act, an "employee" is defined as "any person engaged in "maritime employment." §902(4) of the Act defines an "employer" as "an employer whose employee is engaged in maritime employment upon the navigable waters of the United States." Adjoining piers, wharves, and drydocks are included in this definition of "employer" if the employer uses them in loading, unloading, repairing or building a vessel. Since the employer in the instant case was not engaged in the business of loading or unloading, repairing or building vessels, the major issue to be decided in this case is whether Mr. Santo's employment was "maritime" in nature, under the definitions propounded in the Act. If not, the Longshoremen's Act is inapplicable here, and the Florida Workmen's Compensation Act must govern the claim.

In Peter v. Arrien, 325 F. Supp. 1361 (E. D. Pa. 1971)., Aff'd 463 F. 2d 252 (3rd Cir. 1972), the Court held that, for purposes of applying the Federal Longshoremen's Act, a "decedent is engaged in maritime employment if his activities were directly connected with a maritime purpose." Id. at 1365 (Emphasis Added).

Further, in Posavec v. Merritt-Chapman and Scott Corporation, 106 F. Supp. 170 (S.D. N. Y. 1952), the Court held that a night watchmna, who received a fatal



injury on board a barge he was guarding, was not employed for a "maritime purpose", since his duties as a watchman did not relate to navigation or maintenance of the vessel — despite the fact that the accident occurred on board the barge on navigable water. The Posavec Court, in denying Federal Longshoremen's benefits, stated:

> "maritime employment cannotes service which is related directly to the actual business of navigation." Id. at 172 (Emphasis Added)

The Court in Posavec, in holding that the guard's accident did not come within the ambit of the Federal Act, also provided a working definition of "maritime employment" — ie, service relating directly to navigation.

In the instant case, the record amply reveals that Mr. Santo's duties as a guard were unrelated to the operation, navigation or maintenance of the vessel which he guarded. His only duty was to control access to the boat (T-25,27,28,37,52,53,62,64,65). Indeed, Mr. Santo received no training in navigation or operation of the vessel (T46,76), and was not even permitted to board the boat except to take breaks and investigate unauthorized persons (T-29,37,48).

The records in this case also shows that the Petitioner was not permitted to board the vessel which he guarded, except for coffee breaks or the suspected presence of unauthorized persons (T-29,37,47,48,98, 101,104,105). His sole duty was to guard access to the boat, and this duty was to be carried out on shore.

Although Captain Berryman stated that the Petitioner's "general orders" required him to patrol the boat itself, these "general orders" indicate nothing of the kind (T-118).

Thus, under both Peter and Posavec, supra, Mr. Santo's employment cannot be deemed "maritime" in nature, thereby excluding him from coverage under the Federal Longshoremen's Act. See 33 USC, Section 902(3), 903. The Posavec case in particular shows that the occurrence of an injury on navigable waters does not, in and of itself shift jurisdiction from State to Federal Court.

Likewise, Feick Security is not a "maritime" employer under §902(4) of the Federal Act, since its contract with the University of Miami states that only guard service was to be provided for the University vessels, not crew members or navigational personnel (T-113,114). Neither Mr. Santo nor Feick Security Systems was engaged in the "maritime employment" necessary to invoke jurisdiction under §902(3)(4) of the Federal Longshoremen's Act.

The nature of a land based Compensation claimant's employment relative to the Longshoremen's Act was recently analyzed by this Court in City of Plantation v Roberts, ____So2nd, ____Case No. 47,405, (Fla. 1976). The Roberts Case concerned a land based policeofficer who was injured while operating a police launch on the water. This Court pointed out that, in determining the applicability of the Federal Longshoremen's Act in such a case, the contractual basis for the Claimant's employment must be examined. If the Claimant and his



Employer contracted with reference to State Law, then it is the State Workmen's Compensation Statute which governs the Claim. The determinative test is whether the nature of the Claimant's employment is connected with maritime commerce. In support of this rule, Justice Hatchett's majority opinion cited the United State Supreme Court's Decision in Grant Smith — Porter Ship Company v Rhode, 257 US 469 (1922), which held that, where shipwright and his employer contracted with reference to the State Compensation Statute, the shipwrights injury on navigable waters was covered by State not Federal Compensation Law. This Court, therefore recognized that a "local" injury occurring on navigable waters invokes State Compensation Jurisdiction.

The record in the instant case reveals that the Petitioner was instructed not to board the vessels which he guarded, except under certain circumstances (T-27-29,37,47,48,62,64,65,98,101,104,105). He was not trained for maritime or navigation work (T-46). His employment, like Robert's, was contracted with reference to State not Federal Compensation Laws, and the nature of his employment was not at all connected with maritime commerce. Indeed, the Petitioner's link with maritime commerce is even more attenuated than that of Officer Roberts. The Petitioner's injury was indeed "local" in nature, and this Court's decision in Roberts mandates that State Compensation Jurisdiction be invoked in the instant case.

Finally, in Roberts, Supra, this Court spoke of the "constitutional boundary between the admiralty jurisdiction and the realm of State Law." Indeed, the constitutional roots of the Federal Longshoremen's Act

reveal that Federal Jurisdiction should not be extended to "local" injuries occurring on navigable waters. It is the Interstate commerce clause, Article 1, Section 8 of the United States Constitution which gave Congress the authority to pass the Longshoreman's Act. Yet, the Interstate Commerce Clause allows Congress to extend its ambit only to maritime commerce. Since the constitutional power source for the Longshoremen's Act is limited only to maritime commerce, then the Act itself is similarly limited. Thus, if the Petitioner's accident was "local" and had no connection with maritime commerce, the aegis of the Federal Act cannot be extended to him. His remedy properly falls within the jurisdiction of the Florida Department of Commerce.

-II-

IN THE CASES CITED IN THE ORDER OF THE JUDGE OF INDUSTRIAL CLAIMS, WHICH WAS AFFIRMED BY THE INDUSTRIAL RELATIONS COMMISSION, ARE DISTINGUISHABLE FROM THE INSTANT CASE.

In his Order of May 17, 1976, the Judge of Industrial Claims cited three cases in support of his adjudication. Each of





5. The Petitioner, ALBERTO SANTO, now deceased, worked for the Employer, FEICK SECURITY SYSTEMS, as a security guard. He was assigned by the employer to control access to a research vessel owned by the University of Miami (T-25,26,37). He was not permitted to board the vessel which he guarded except to drink coffee, use the toilet facilities and investigate the presence of unauthorized person (T-27,28,29,37,48). Otherwise, he was not to board the boat and was required to remain on shore guarding access to the vessel (T-37,47,62,64,65). The Petitioner and the other guards who worked for FEICK, received no training in maritime work, or in the maintenance or operation of the vessel which they guarded (T-46).

The Petitioner's Industrial accident occurred on or about December 23, 1974, when he fell on board the vessel which he was guarding and ostensibly injured his ribs (T-121). It was stipulated that the accident occurred on board the vessel (T-87). Claim was initially filed by the Petitioner, and then amended by the Petitioner's widow, MARY SANTO, to include a claim for death benefits.

The Order of the Judge of Industrial Claims of March 17, 1976 dismissed the Claim and found that the Florida Department of Commerce had no jurisdiction to hear the Petitioner's Compensation Claim, and that the Claim came within the aegis of the Federal Longshoremen And Harbor Workers Compensation Act. The Industrial Relations Commission affirmed this Order in a short form Pecuriam Decision dated February 15, 1977.

6. The decision of the Industrial Relations Commission fails to comply with the essential requirements of law, and is contrary to the intent and language of the Federal Longshoremen And Harbor Worker's Compensation Act. The Decision is especially contrary to this Court's Decision in City of Plantation v Roberts,____ So.2nd.____, Case No. 47,405 (Fla. 1976).



## APPENDIX H

Berryman admitted a total unfamiliarity with Mr. Santo (T-79, 82).

### POINT INVOLVED ON APPEAL

WHETHER THE JUDGE OF INDUSTRIAL CLAIMS ERRED IN DISMISSING THE CLAIMANT'S CLAIM WITH PREJUDICE, ON THE GROUND THAT JURISDICTION OF THE CLAIM CAME UNDER THE FEDERAL LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT. (Raised by Application for Review Points 1, 2, 3, 4, 5, 7, 8, 9).

### ARGUMENT

WHETHER THE JUDGE OF INDUSTRIAL CLAIMS ERRED IN DISMISSING THE CLAIMANT'S CLAIM WITH PREJUDICE, ON THE GROUND THAT JURISDICTION OF THE CLAIM CAME UNDER THE FEDERAL LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT. (Raised by Application for Review Points 1, 2, 3, 4, 5, 7, 8, 9).

#### A

THE DECEDENT'S EMPLOYMENT WAS NOT MARITIME IN NATURE.

It is respectfully submitted that the Judge of Industrial Claims erred in dismissing the instant claim,

pursuant to the Federal Longshoremen's and Harbor Worker's Compensation Act. It is true that the parties did stipulate that Mr. Santo's injury occurred while on board the vessel which he guarded (T-85). However, the locus of the injury is not the test by which Federal Compensation jurisdiction is determined. Instead, it is the purpose of the Claimant's employment which governs the applicability of the Federal Longshoremen's Act.

The Federal Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C., §902(3) states that, under the Act, an "employee" is defined as "any person engaged "maritime employment." §902(4) of the Act defines an "employer" as "an employer whose employee is engaged in maritime employment upon the navigable waters of the United States." Ajoining piers, wharves, and drydocks are included in this definition of "employer" if the employer uses them in loading, unloading, repairing or building a vessel. Since the employer in the instant case was not engaged in the business of loading or unloading, repairing or building vessels, the major issue to be decided in this case is whether Mr. Santo's employment was "maritime" in nature, under the definitions propounded in the Act. If not, the Longshoremen's Act is inapplicable here, and the Florida Workmen's Compensation Act must govern the claim.



## APPENDIX I

The Appellant, ALBERTO SANTO, by and through MARY SANTO, his widow and her undersigned attorneys, makes application for review of the Order entered in the above captioned cause on March 17, 1976, and cites the following as grounds and errors:

1. That the Order is contrary to law.

2. That the Order is contrary to the evidence.

3. That the Order is contrary to the law and the evidence.

4. That the Judge of Industrial Claims held all presumptions against the Appellant, contrary to the intent and purpose of the Florida Workmen's Compensation Act.

5. That the Judge of Industrial Claims erroneously resolved the question of applicability of the Florida Workmen's Compensation Act against the Employee/Appellant.

6. That the Judge of Industrial Claims in his summary of the evidence and testimony presented, did not properly set forth the nature and substance of said evidence and testimony.

7. That the Judge of Industrial Claims erred in holding that jurisdiction of the above styled claim comes under the Federal Longshoremen's and Harbor Compensation Act, and not the Florida Workmen's Compensation Act.

8. That the Judge of Industrial Claims erred in holding that he lacks jurisdiction in this matter.

9. That the Judge of Industrial Claims erred in granting the carrier's Motion to Dismiss and dismissing the above styled case with prejudice.



## APPENDIX J

CORAL GABLES, FLORIDA
Monday, February 2, 1976, 3:30 p.m.
HEARING RESUMED PURSUANT
TO ADJOURNMENT

APPEARANCES:

NACHWALTER, CHRISTIE, AND FALK, P.A.,
BY: GEORGE M. NACHWALTER, ESQ.,
9211 Bird Road,
Miami, Florida,
Appearing on behalf of the Claimant.

BRUMER, MOSS, COHEN, AND RODGERS, P.A.,
BY: EDWARD A. MOSS, ESQ.,
28 West Flagler Street,
Miami, Florida,
Appearing on behalf of the Employer.

MARLOW, MITZEL, ORTMAYER, AND SHOFI, P.A.,
BY: FREDRICKA G. SMITH, ESQ.,
1428 Brickell Avenue,
Miami, Florida,
Appearing on behalf of the Carrier.

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Thereupon, the following proceedings were had:

THE COURT: We are ready to proceed on this?

MR. NACHWALTER: Yes, Judge. Is the Court familiar with what we are here for?

THE COURT: Yes.

MS. SMITH: This is the Carrier's motion to dismiss on the grounds that there is no jurisdiction under the workmen's compensation act to hear or decide this claim, but rather that jurisdiction lies under the Florida Longshoreman's and Harbor Workers Act. I understand that Mr. Moss is representing Feick Security Systems. Although I haven't ever received a notice of appearance, I assume that's what you are here for today?

MR. MOSS: Yes.

MR. NACHWALTER: Let me state what the situation is. This is a final hearing today on the question of jurisdiction. A motion to dismiss was set down by the employer through their insurance company, Zurich Insurance Company, and we came before your Honor to argue the motion to dismiss. We came down at a hearing and it was decided at that time that a factual question existed as to the question of jurisdiction and that you could not make a final ruling on a motion alone but that the matter would be set down for a final hearing on the question of jurisdiction. So we are here today for a final hearing with live testimony to present in front of you, as we have set on two or three other occasions, for you to make a determination as to whether or not this is under state workmen's comp or whether it lies under the jurisdiction of the Longshoremen and Harbor Workers Act.



The last time we were set before you on final hearing, we were prepared to go forward but in view of the fact that Zurich Insurance Company, the workmen's comp insurance company — in view of the fact that they are contending it is Longshoremen's and Harbor Workers and in view of the fact they have no longshoremens insurance, they only have workmen's comp insurance, the witnesses requested that they consult their personal lawyer at Feick Security Systems and it was continued for Mr. Moss, who was the attorney for Feick Security.

THE COURT: There were two appearances before me?

MR. NACHWALTER: We had a pretrial conference and we were set for a final hearing but at that final hearing, since Feick had no personal lawyer present, the matter was continued.

THE COURT: Is that your recollection, Fredricka?

MS. SMITH: Yes, that is. That is what I understand the position of Feick Security Systems is although they really have not made any statement.

MR. MOSS: What obligation do we have to make a statement? If you could tell me properly what obligation we have.

MS. SMITH: I assume you are not joining in our motion, naturally.

MR. MOSS: Motion? Heavens no.

## APPENDIX K

### CLAIM FOR COMPENSATION

I hereby make claim for compensation and/or remedial treatment and care under the Florida Workmen's Compensation Law, and submit the following information.

Name, address, and social security no. of employee
Alberto Santo SS: 055-03-0666
8151 N.W. 27 Avenue
Miami, Florida

Name and address of employer
Feick Security System (Feick Fred L & Assoc.)
9200 S. Dadeland Boulevard
Miami, Florida

Place of accident
Dodge Island

Date of accident and hour of day
12-23-74 at approx. 2:15 A.M.

Cause of injury
fell to the ground

Nature of injury (describe with reasonable particularity)
Low back, legs, hernea.

State briefly what compensation and/or remedial treatment is claimed at this time.
Temporary total for all periods unable to work; temporary partial; reimbursement for drugs, medicines and transportation expenses; medical



treatment; a permanent partial disability rating when maximum medical recovery is reached; penalties and interest; reasonable attorneys fees; and any and all other benefits under F.S. 440 to which the claimant may be entitled.

Date of claim
1-20-75

Signature of claimant or his attorney
NACHWALTER, CHRISTIE AND FALK
9211 Bird Road
Miami, Florida 33165
223-2391

**APPENDIX L**

April 30, 1975

Judge Mario Goderich
Bureau of Workmen's Compensation
2801 Ponce de Leon Boulevard
Coral Gables, Florida 33134

Re: Alberto Santo vs. Feick Security System
Claim No.: 055-03-0666
D/A: 12-23-74

Dear Judge Goderick:

We wish to amend our claim for compensation filed on January 20, 1975 and our amended claim for compensation filed on April 17, 1975 to include death benefits as Mr. Santo is now deceased.

Very truly yours,

G. M. Nachwalter

GMN/df

cc: Gerald H. Towne
Florida Department of Commerce
Bureau of Workmen's Compensation
Tallahassee, Florida 32304

cc: Zurich Insurance Company
5600 Diplomat Circle
Orlando, Florida 32810



cc: Feick Security Systems
9200 South Dadeland Boulevard
Miami, Florida 33156

MR. NACHWALTER: Let me finish arguing and you can say what you want.

Our understanding of the facts of the case, recognizing of course that no sworn testimony has been taken, is that part of the duties of a security guard such as Mr. Santo was to check the boats and the vessels and so forth. This is what our investigation has revealed.

On the night in question, Mr. Santo was checking one of the vessels and was injured on that vessel. There is absolutely no question about the fact that when his injury occurred, he was physically on the boat. No question about it.

Thereafter, Mr. Santo was hospitalized and received surgery to his hip and so forth. He had pretty bad injuries as a result of it. Again, he was hospitalized for quite some time.

The workmen's comp insurance company, Zurich, picked up the case on workmen's comp, paid him temporary total, paid for his initial hospitalization, nursing, and so forth.

Subsequent thereto, Mr. Santo died. We had originally filed a claim and then we amended the claim to make it a death claim on behalf of his widow.

There are at this point over $20,000 in outstanding medical bills, hospital bills, and so forth; nursing home bills that are in question because before he died, he was



transferred to a nursing home because he was totally, completely out of it.

The hearing on the case was set before your Honor on July 2nd. I received a call from Mr. Marlow's office at that time and there were a number of things we discussed. One of them was that we had technically not entered the widow on the death claim and so forth. So we amended that and included the widow. We also agreed with them at that time to postpone the hearing, give them an opportunity to review the file, and to give us a position.

Subsequent thereto, I received a call informing me that they were going to controvert the case on the grounds that it came under the Longshoremen's and Harbor Workers Act and not under their workmen's compensation.

in the

# Supreme Court of the United States

**October Term, 1977**

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**NO. 77-1369**

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MARY SANTO,

*Petitioner,*

*vs.*

FEICK SECURITY SYSTEMS
ZURICH INSURANCE COMPANY
AND THE
FLORIDA INDUSTRIAL
RELATIONS COMMISSION

*Respondents.*

---

## RESPONDENT ZURICH INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA INDUSTRIAL RELATIONS COMMISSION

---

Fredricka Greene Smith
MARLOW, SHOFI, ORTMAYER,
SMITH & SPANGLER
1428 Brickell Avenue
Miami, Florida 33131

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## TABLE OF CITATIONS





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**NO. 77-1369**

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MARY SANTO,

*Petitioner,*

*vs.*

FEICK SECURITY SYSTEMS
ZURICH INSURANCE COMPANY
AND THE
FLORIDA INDUSTRIAL
RELATIONS COMMISSION

*Respondents.*

---

## RESPONDENT ZURICH INSURANCE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA INDUSTRIAL RELATIONS COMMISSION

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## STATEMENT OF THE CASE

Alberto Santo, deceased husband of the petitioner, was injured on December 23, 1974 in an accident in the course of his employment as a watchman for Feick Security Systems.[1] The accident occurred while Santo was carrying out his duties aboard the M.V. Gillis, a University of Miami research vessel docked in the navigable waters of Biscayne Bay. Following the death of Santo the claim was amended and is currently being brought on behalf of Santo's widow for death benefits.[2]

Respondent, Zurich Insurance Company, moved to dismiss the claim on the ground that Florida Statute, section 440.09(2)[3] precludes the payment of benefits to an employee such as Santo, covered by the Federal Longshoremen's and Harbor Workers' Compensation Act. Santo's claim lies within federal rather than state jurisdiction.

An evidentiary hearing was held before the Judge of Industrial Claims in which witnesses testified regarding the nature of Santo's work and the circumstances surrounding his accident. The undisputed facts placed Santo at the time of his accident aboard the deck of the vessel which he customarily patrolled in the line of duty.

Upon consideration of the evidence the trial judge issued an order[4] granting Zurich's motion to dismiss the claim on the ground that the state lacked jurisdiction, citing as authority *Atlas Iron and Metal Company v. Hesser,* 177 So.2d 199(Fla. 1975); *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114 (1962); and *Rex Investigation and Patrol Agency v. Collura,* 329 F. Supp. 696 (E.D.N.Y. 1971).

Santo appealed the decision to the Florida Industrial Relations Commission which, after hearing oral argument, issued a brief *per curiam* order[5] finding no reversible error and therefore affirming the decision of the Industrial Claims Judge.

Santo's petition for writ of certiorari was subsequently denied by the Florida Supreme Court[6] which

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[1]Petitioner has incorrectly named Feick Security Systems as a party-respondent herein. Zurich Insurance Company, Feick's state workmen's compensation carrier, denied coverage to Feick maintaining that Santo's claim fell within the jurisdiction of the Federal Longshoremen's and Harbor Workers' Compensation Act. Feick then retained independent counsel to represent its interest in the state proceedings but failed to file a timely appeal to the Florida Industrial Relations Commission of the original order of the trial judge dismissing Santo's claim for lack of state jurisdiction.

[2]The parties agreed to bifurcate the hearing before the Judge of Industrial Claims so that only the issue of jurisdiction was litigated below. Therefore, there has been no evidence adduced regarding the extent of Santo's injuries or whether his death is causally related to the accident.

[3]F.S.§440.09 Coverage. —
(2) No compensation shall be payable in respect of the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's and Harbor Workers' Compensation Act, or the Jones Act.

[4]See Petitioner's Appendix D at App. 10.

[5]See Petitioner's Appendix C at App. 7.

[6]See Petitioner's Appendix B at App. 5.

found simply that there had been "no departure from the essential requirements of law" according to the applicable standard for review of Commission orders enunciated in *Scholastic Systems, Inc. v. LeLoup*, 307 So.2d 166(Fla. 1974).

Subsequently, Santo petitioned for a rehearing by the Florida Supreme Court urging the Court to consider as controlling the recent opinion of the United States Supreme Court in *Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249(1977). The petition for rehearing was summarily denied by the Florida Supreme Court on December 28, 1977.[7]

Finding the door closed to relief in the state judicial system, Santo initiated proceedings in the federal system by filing a claim for benefits under the Federal Longshoremen's and Harbor Workers' Compensation Act. This claim is currently pending before the federal Administrative Law Judge.

## REASONS FOR DENYING THE PETITION

### I.

### THE DECISION BELOW IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *NORTHEAST MARINE TERMINAL COMPANY, INC. V. CAPUTO*, 432 U.S. 249(1977)

Neither the 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act nor the interpretation of those amendments in

[7]See Petitioner's Appendix at App. 3.



*Northeast Marine Terminal Company, Inc. v. Caputo*, 432 U.S. 249(1977) relates directly to the issues in this case. In *Northeast* the Court considered whether certain dockside workers (one checking, the other unloading, cargo from a ship's container) were "employees" under the broadened coverage provided by the 1972 amendments to the federal Act. The purpose of the amendments, the Court stated, was to provide continuous coverage to these amphibious workers engaged in modern longshoring operations who, prior to the amendments, would have been covered for only part of their activity.

Santo, on the other hand, received injuries while acting as a watchman aboard a vessel afloat in navigable waters. He, therefore, was a member of a different class of worker; a class not reached for consideration by the Court in *Northeast:*

> As the definition of employee makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two sub-categories.

This case also does not involve the question whether Congress excluded people who would have been covered before the amendments; that is, workers who are injured on navigable waters as previously defined. See *Weyerhaeuser Co. v. Gilmore*, 528 F. 2d 957(CA9) Cert. denied,___U.S.___(1976). *Id.* 432 U.S. at ___n. 25.

How then can petitioner claim a conflict between the decision below and that in *Northeast* when the Courts have not addressed the same issue?

Likewise, petitioner's reference to post-*Northeast* decisions allegedly in conflict with the decision below is off course. Again each of these cases deals with workers injured in the expanded situs, i.e., on an adjoining pier or terminal facility, rather than in the original situs, i.e., on navigable waters.[8]

[8]*Cargill, Inc. v. Powell,* Case No. 75-2655 (9th Cir. Nov. 17, 1977) held a worker unloading grain from railroad cars on a marine terminal was not involved in longshoring operations and therefore was not a covered employee under the federal Act.

*Dravo Corp. v. Banks,* Case No. 77-1433 (3rd Cir. Dec. 16, 1977) held a janitor employed at a shipbuilding facility was not a "shipbuilder" under the Act.

*Stockman v. John T. Clark and Son of Boston,* 539 F.2d 264 (1st Cir. 1976), held a worker engaged in "stripping" containers in a waterfront area was a "longshoreman" covered by the 1972 amendments.

This case is erroneously cited by petitioner as standing for the proposition that a security guard is not within the parameters of the federal Act. (Petitioner's Brief at 24). The case does not deal with a security guard at all. In discussing whether the union label of longshoreman should be determinative of the coverage issue under the Act, the Court mentions that a longshoreman's union may force an employer to hire its members "for such unlongshoremen-like positions as clerks or guards". *Id* at 272. However, even if a guard does not fall within the specific category of "longshoreman", he is not thereby precluded from coverage under the Act as a general employee engaged in maritime employment. As the *Stockman* Court points out,

> This is not to say that workers who are not plainly longshoremen, or otherwise plainly included in some recognized category of maritime employment, may not have to demonstrate their entitlement to coverage by showing that their duties encompass shipboard activity. *Id.* at 277.

Santo has made that showing.



## II.

## THE DECISION BELOW CORRECTLY INTERPRETS THE JURISDICTIONAL PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND IN NO WAY THREATENS "STATE AND FEDERAL RELATIONSHIPS"

Petitioner fails to cite a single case which excludes from coverage under the federal Act a watchman injured while patrolling a vessel in navigable waters. In fact, the federal courts have consistently granted such watchmen the benefits of the Act holding that a watchman's services are maritime in nature. See, *Hillcone S.S. Co. v. Steffen,* 136 F.2d 965(9th Cir. 1943); *Ford v. Parker,* 52 F. Supp. 98(D. Md. 1943); *Rex Investigation and Patrol Agency, Inc. v. Collura,* 329 F. Supp. 696(E.D.N.Y. 1971).

Although each of these cases was decided prior to the enactment of the 1972 amendments, the result would in no way be altered by application of the new language. The amendments have simply incorporated the original "status" term, "maritime employment" into section 902(a) requiring the employee himself, as well as his employer, to be engaged in "maritime employment."[9] Therefore, a consideration of pre-

[9]Petitioner has never argued that Feick Security Systems is not an employer within the meaning of section 902(4) of the Act. To qualify as an employer it is necessary only that an employer have one employee engaged in maritime employment. See *Flowers v. Travelers Insurance Company,* 258 F. 2d 220 (5th Cir. 1958). Therefore, since Santo was engaged in maritime employment at the

amendment case law is still apposite.[10]

The jurisdictional "hiatus" conjured up by petitioner appears to be imaginary.[11] It is Santo who here urges a return to the uncertainty of past theories re-

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time of his accident, he qualifies both himself and his employer for coverage. By adding the new status requirement in §902(3) Congress has made the original requirement in §902(4) redundant; if the claimant/employee meets the status requirement, his employer automatically qualifies.

[10]See *Stewart v. Brown and Root, Inc.*, 7BRBS 356(1978).

> . . . it must be noted that the new [status] test is based on the meaning of "maritime employment", a term which has existed in the statute from its inception. The term was originally part of the definition of "employer", and satisfaction of that definition was the source of substantial litigation on the issue of the jurisdiction of the Act. There is no evidence in the statute or the legislative history to indicate that Congress intended the term "maritime employment" to have a more restrictive meaning in the amended section on "employees" than it had in the unamended section on "employers". Hence, reference to prior judicial construction of the phrase is entirely appropriate in post-amendment cases. *Id.* at 360.

[11]Petitioner notes that her claim for benefits under the federal Act has not yet been adjudicated. She alleges the "probability" of a denial; the possibility of being left without legal recourse. Petitioner's Brief at 24. Since her claim is pending, petitioner has suffered no injury as a result of the State Court's action and is requesting merely an advisory opinion from this Court "on the breadth and width of the jurisdictional" provisions of the Act.



quiring case by case adjudication.[12] The facts in this case present no new substantial federal question but rather fit neatly into the accepted jurisdictional structure of the federal Act and this Court's most recent interpretations of the Act.

[12]*Davis v. Department of Labor and Industries*, 317 U.S. 249 (1942)

## CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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# Appendix

Following are Sections 2(3), 2(4), and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424, 1426, as amended in 1972, 86 Stat. 1251, 33 U.S.C. 902(3), 902(4), 903(a). The pre-1972 language which the amendments eliminated is enclosed in black brackets; the new language which the amendments added is printed in italics; and the pre-1972 language which the amendments left unchanged is printed in roman.

## DEFINITIONS

Sec. 2. When used in this Act —

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of crew of any vessel, [nor] *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [(including any dry docks)] *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).*

## COVERAGE

Sec. 3(a) Compensation shall be payable under this Act in respect of disability of death of an employee, but only if the disability or death result from an injury occurring upon the navigable water of the United States [(including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law] *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).* No compensation shall be payable in respect of the disability or death of —

(1) A master or member of a crew of any vessel, [nor] *or* person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.



## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three true copies of the foregoing Respondent Zurich Insurance Company's Brief in Opposition to Petition for Writ of Certiorari to the Florida Industrial Relations Commission, was mailed to GEORGE M. NACHWALTER, ESQ. of NACHWALTER, CHRISTIE & FALK, P.A., Attorneys for Petitioner, 9445 Bird Road, Miami, Florida 33165, to MRS. VERNA MARTIN, Clerk, INDUSTRIAL RELATIONS COMMISSION, 1321 Executive Center Drive, East, Tallahassee, Florida 32301 and EDWARD MOSS, ESQ., of BRUMER, MOSS, COHEN & RODGERS, Attorneys for FEICK SECURITY, 28 West Flagler Street, Miami, Florida this _____day of April, 1978.

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